

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>FRANK MUSALEK</b>	)	
Claimant	)	
VS.	)	
	)	
<b>NATIONWIDE MOBILE HOMES</b>	)	Docket No. 247,878
Respondent	)	
AND	)	
	)	
<b>WAUSAU INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appealed the March 13, 2000 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

**ISSUES**

This is a claim for a July 28, 1999 accident and resulting injuries to claimant's right foot, ankle, and leg. After conducting a preliminary hearing on March 7, 2000, Judge Moore found that claimant was an independent contractor and denied the request for benefits.

Claimant contends the Judge erred. Claimant argues that the criteria set forth in *McCubbin*<sup>1</sup> establishes that he was an employee of respondent rather than an independent contractor. Conversely, respondent contends the Judge's findings are well supported by the evidence and should be affirmed.

The only issue before the Appeals Board on this appeal is whether claimant was an employee of respondent or an independent contractor at the time of the accident.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date, the Appeals Board finds:

---

<sup>1</sup> *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

1. The parties stipulated that on July 28, 1999, claimant was injured while working for respondent. The sole issue is whether at the time of the accident claimant was working as an employee or independent contractor.

2. The Appeals Board affirms the Judge's conclusion that at the time of the accident claimant was working for respondent as an independent contractor rather than an employee.

3. It is often difficult to determine in a given case whether a person is an employee or independent contractor since there are elements pertaining to both that may occur without being determinative of the relationship.<sup>2</sup>

4. There is no absolute rule for determining whether an individual is an independent contractor or an employee.<sup>3</sup>

5. The relationship of the parties depends upon all the facts and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.<sup>4</sup>

6. The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed. It is not the actual interference or exercise of the control by the employer but the existence of the right or authority to interfere or control that renders one a servant rather than an independent contractor.<sup>5</sup>

7. In addition to the right to control and the right to discharge a worker, other commonly recognized factors for determining whether a worker is an employee or an independent contractor are: (1) the existence of a contract to perform a certain piece of work at a fixed price; (2) the independent nature of the worker's business or distinct calling; (3) the employment of assistants and the right to supervise their activities; (4) the worker's obligation to furnish tools, supplies, and materials; (5) the worker's right to control the progress of the work; (6) the length of time that the worker is employed; (7) whether the

---

<sup>2</sup> *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

<sup>3</sup> *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

<sup>4</sup> *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

<sup>5</sup> *Wallis*, at pp. 102 and 103.

worker is paid by time or by the job; and (8) whether the work is part of the regular business of the employer.<sup>6</sup>

8. Based upon the following facts, among others, the Appeals Board concludes that, for purposes of the Workers Compensation Act, at the time of the accident claimant was an independent contractor:

(1) Claimant had the freedom to choose which odd jobs he would perform.

(2) Claimant determined his work schedule and the number of hours that he worked.

(3) Rather than billing for the number of hours he worked, claimant's billings were based upon the odd jobs or tasks that he performed and what he believed his work was worth.

(4) The working relationship between claimant and respondent was of short duration.

(5) Respondent did not control or supervise claimant's work.

(6) The parties intended that claimant would be treated as an independent contractor as evidenced by the fact that respondent did not withhold taxes from claimant's checks.

9. As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.<sup>7</sup>

10. The Appeals Board adopts the findings and conclusions set forth in the preliminary hearing Order.

**WHEREFORE**, the Appeals Board affirms the March 13, 2000 preliminary hearing Order entered by Judge Moore.

---

<sup>6</sup> *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

<sup>7</sup> K.S.A. 1999 Supp. 44-534a(a)(2).

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 2000.

---

BOARD MEMBER

c: Jan L. Fisher, Topeka, KS  
John W. Mize, Salina, KS  
Bruce E. Moore, Administrative Law Judge  
Philip S. Harness, Director